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Supreme Court of the United States

OCTOBER TERM 1946—No. 1158.

KATHERINE C. WILLIAMS,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION.

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IN THE

Supreme Court of the United States

KATHERINE C. WILLIAMS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER.

I.

The facts of the case at bar come squarely within those of the *May* v. *Heiner* group and are most dissimilar at many important points from *Fidelity Company* v. *Rothensies*.

The case at bar presents a much stronger case for the taxpayer than do the facts in *McCormick* v. *Burnet*, 283 U. S. 784, cited and digested at pages 27 and 28 of Petitioner's main brief.

In the *McCormick* case, the Trust Agreement provided for its termination upon the death of the last survivor of Settlor's three children. The instrument then provided that upon such termination the trust corpus "shall be paid over and delivered to said party of the first part (Settlor), if she shall then be living." There was no proof in the *McCormick* case of the ages of the mother or of the children and there was obviously a much greater probability that the trust property would revert to the donor than the one chance in ten thousand in the case at bar (Finding of Fact No. 2, R. 87, R. 74-5).

In most of the cases of the *May* v. *Heiner* group there was a definite possibility of reverter to the grantor, and, a greater possibility than that here involved. The case at bar cannot be distinguished from them.

On the other hand, there is no support for respondent's argument that the instant case is "practically identical to and is obviously controlled by this court's decision in *Fidelity Company* v. *Rothensies.*" It is true that the Trust Agreement in the case at bar, like that in the *Fidelity Company* case, included a contingent power of appointment in grantor, but there the similarity ceases and all of the following points of substantial difference exist:

(a) In the *Fidelity* case, the issue whether the transfer was one which was "intended to take effect in possession or enjoyment at or after death," was not before this court. That point had been decided by the Circuit Court of Appeals on the ground that the *Fidelity* case was closer to *Klein* v. *U. S.*, 283 U. S. 231, than to *May* v. *Heiner*, 281 U. S. 238, and no certiorari had been granted on that point. The only matter before this court was the *amount* of the Trust Fund which was to be included in decedent's taxable estate.

(b) In the *Fidelity Co.* case the gift of the principal of the trust was to persons who were not in being and who might reasonably never come into being, in marked contrast to the transfer here in question which constituted a vested remainder in decedent's daughter under the Law of New York. How could a transfer take effect "in possession or enjoyment" while the persons to "possess and enjoy" were not in existence and might never be born?

(c) The cross-examination of Petitioner's actuary showed that the mathematical probability that the two daughters of the grantor in the *Fidelity Trust Company* case would predecease their mother was one in eighty-nine as against one chance in

twenty-five hundred that the grantor's daughter and grandchildren in the case at bar would all predecease her (R. 72, 73, 75, fol. 225; Finding of Fact No. 2, R. 87). But this comparison does not measure the difference in probabilities that the two grantors would have the right to will the trust estate, because, if the daughters of the grantor in the *Fidelity* case died after their mother, the trust property would still have passed under the mother's will, if both daughters died without leaving surviving descendants. So the probability in the *Fidelity* case was much greater than one in eighty-five. On the other hand, as shown in petitioner's main brief, all Mrs. de Brabant's issue living at the time of the making of the trust might have predeceased her and still she might not have received right to will the trust property, as such daughter and granddaughters might well have had children living at the time of Mrs. de Brabant's death, even if they themselves predeceased Mrs. de Brabant. For this reason, there could not have been a greater chance than one in ten thousand of reverter to Mrs. de Brabant (Finding of Fact No. 2, R. 87; R. 74-5).

(d) The grantor in the *Fidelity* case made a will providing for the disposition of the corpus of the trust in case her two daughters died without issue, showing that she gave consideration to the chance that the power of appointment reserved by the Trust Agreement might become operative. In contrast to this, Mrs. de Brabant had a Will at the time she made the trust and executed three testamentary provisions shortly thereafter (R. 49). In no one of these was there any provision therein with respect to a power of appointment of the trust property here in question, or of any other property, showing that she did not give any consideration to so remote a possibility as her dying without issue. It is true, as stated by Respondent, that Mrs. de Brabant's Will, in effect

> at the time of her death, stated simply that any property over which she had a power of appointment was to go to her daughter, Katherine C. Williams, absolutely and forever, and to her issue, if she, Katherine, was not living at the time of the decedent's death. This is precisely the provision in the Trust Agreement and conferred no rights on anyone other than those already conferred by the Trust Agreement itself (R. 53-68).

The courts below decided against Petitioner upon the ground that this court had held in the *Fidelity* and *Field* cases that any possibility of reverter brought the trust property into the taxable estate of decedent (R. 84 and 93).

The entire opinion of the Circuit Court of Appeals below is as follows:

> "This case presents precisely the same question which we passed upon last May in *Commissioner of Internal Revenue* v. *Bayne's Estate,* 155 Fed. (2) 475. As the Supreme Court said in *Commissioner of Internal Revenue* v. *Estate of Field,* 324 U. S. 113, 116: 'It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest.'
>
> "Judgment affirmed."

In *Commissioner* v. *Bayne's Estate,* referred to in the in the above quotation, the Circuit Court of Appeals reluctantly held that the trust property there in question was taxable because it was constrained to hold that this court had overruled the *May* v. *Heiner* group. Neither court below attempted to distinguish the case at bar from the *May* v. *Heiner* group.

As shown above, it cannot possibly be distinguished from *McCormick* v. *Burnet.*

II.

The Solicitor-General concedes that confusion has attended the interpretation of this Court's decision in the *Fidelity Company* case, and concedes that an elucidation by this Court is necessary but without warrant seeks to restrict such review to the effect of reverters by operation of law.

The Solicitor-General at page 8 of his brief, concedes, as above stated, that confusion has attended the interpretation of this court's decision in the *Fidelity Company* case, and states that in Estate of *Spiegel* v. *Commissioner*, No. 1144, this term, the Government is not opposing the granting of a certiorari by this court in order to have settled the question whether a remote possibility of reverter *by operation of law* brings the corpus of an *inter vivos* trust created by the decedent into his taxable estate.

Petitioner submits that there should be no distinction between reverters created by operation of law and those created by express provisions of Trust Agreements. Trust Agreements are in practically all cases formal documents drawn by lawyers. Where the possibility of a reverter by operation of law exists, it is unreasonable to suppose that the lawyer who drew the paper didn't know it and didn't explain it to his client.

III.

The *May* v. *Heiner* group of cases made no distinction between reverters by operation of law and those by reason of express provisions of the trust agreement.

As shown above, the Trust Instrument in *McCormick* v. *Burnet* contained a direct provision for reverter to grantor in case her three children predeceased her.

In the other cases in the *May* v. *Heiner* group the Court makes no point of whether or not the possibility of reverter

was by express provision or, by operation of law and apparently gives that fact no importance.

IV.

The broad question which should be settled by this Court once and for all is whether or not the *May* v. *Heiner* group of cases has been overruled.

If the expressions of this Court in the *Fidelity Company* and *Field* cases are to be taken literally, apart from their context and without regard to the questions which were before this Court in those cases, then it may be argued that the entire *May* v. *Heiner* group has been overruled and that any possibility of reverter, no matter how remote and whether arising from express provisions of the Trust Instrument or by operation of law, brings the corpus of the trust into the taxable estate of decedent grantor. However, the language of this Court must be considered in connection with the subject matter before it. Moreover, it cannot be believed that this Court would lightly or casually overrule a whole line of decisions which had stood for a number of years, especially where the decisions were by a unanimous Court, and where the question was the interpretation of a Taxing Act and not a matter involving a changed concept of government or human rights, and where Congress had approved the interpretation made by the older cases.

All of the above arguments in favor of the continuance of the rule of the *May* v. *Heiner* group were set forth in Petitioner's main brief on this application, Points II to VI, but the Solicitor-General has not attempted to answer a single one of them.

It may be proper at this point to call attention to the harsh effect upon taxpayers of overturning at this late date, and upon such a narrow point, the rule of the *May* v. *Heiner* group of cases. While *May* v. *Heiner* and *McCormick* v. *Burnet,* and others, were decided somewhat less than twenty years ago, they did not undertake to establish any

new rule but merely stated what had been accepted for many years as the proper interpretation of the language "intended to take effect in possession or enjoyment at or after death."

To hold now that a possibility of reverter, however remote (in the instant case, one chance in ten thousand), is sufficient to bring a large trust fund into the taxable estate of decedent grantor is most harsh, especially as such remote contingent reverters are of little value to the grantors and would have been avoided if it had been considered that any such interpretation would be given to the phrase in question as that which is now urged by the respondent.

V.

The approval of *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, by this Court in *Fidelity Philadelphia Trust Co.* v. *Rothensies*, is in effect an approval of the fundamental and underlying principle of the *May* v. *Heiner* group of cases.

This Court cites with approval, at page 111 of its opinion in the *Fidelity-Philadelphia Trust Co.* case, *Reinecke* v. *Northern Trust Company, supra.* That case was largely the foundation for the decision in *May* v. *Heiner*, which refers to the *Reinecke* case several times in its opinion and quotes therefrom as follows:

> " 'In the light of the general purpose of the statute and the language of Sec. 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in Sec. 402 (c) "to take effect in possession or enjoyment at or after his death," include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Sec. 401. That doubt must be resolved in favor of the taxpayer. * * * ' "

VI.

Decedent's failure to exercise her power of appointment is indisputable proof that she considered that she had disposed of her entire interest in the trust fund and did not intend or expect that her transfer would take effect in possession or enjoyment at or after her death.

In the *Fidelity Company* case all the Courts, including this Court, commented upon the fact that the decedent grantor had reserved a power of appointment in her Trust Agreement and had made a Will which exercise such power, as showing the intent of the grantor in making the transfer, and thereby recognizing the importance of the actual frame of mind of the grantor in making the transfer.

To the proverbial man in the street, it would seem absurd to argue that Mrs. de Brabant had any intention other than a gift to her issue. It is the intent of the transferor which controls, not the possible intent of the Trust Company Trustee to provide against *all* contingencies, even those as remote as one in ten thousand.

If it is the actual intention of the transferor which provides the test, as claimed by Petitioner, then decedent's behavior with respect to the power of appointment is of the highest importance. The Trust Fund which was dealt with in this case was made up of three separate transfers (R. 15, 34). The decedent had a Will in effect when she made her first transfer and, shortly thereafter, and while she was making additional transfers to the trust, executed two additional testamentary documents, and in no one of these did she make any reference whatever to the power of appointment (R. 64-68).

This conclusion is further strengthened by the fact that the same attorney who prepared the Trust Agreement prepared all of the Wills above referred to (R. 49).

Conclusion.

Petition for Writ of Certiorari should be granted and the decision below reversed.

Respectfully submitted,

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Dated April 24, 1947.